Concurring Statement of Commissioner J. Thomas Rosch
Federal Trade Commission v. Ovation Pharmaceuticals, Inc.

The Commission has voted unanimously to file a complaint against Ovation Pharmaceuticals, Inc., alleging that Ovation's acquisition of NeoProfen in January 2006 from Abbott Laboratories, Inc. substantially lessened competition. NeoProfen is one of two drugs approved by the Food and Drug Administration ("FDA") to treat patent ductus arteriosus (PDA), a potentially fatal heart defect besetting premature babies. Like Commissioner Leibowitz, I have voted for that complaint. However, like Commissioner Leibowitz, I would also challenge Ovation's earlier August 2005 acquisition of Indocin I.V., which at the time was the only FDA approved drug to treat PDA, from Merck & Co. There is reason to believe that that transaction violated Section 7 of the Clayton Act, which makes unlawful, among other things, any acquisition that tends to create a monopoly.

More specifically, when Ovation acquired Indocin from Merck, Indocin was the only pharmaceutical treatment approved by the FDA to treat PDA. Notwithstanding Indocin's market position, for many years before the acquisition, Merck had sold Indocin for a non-monopoly price (under $30 per vial at the time of the acquisition). Merck, a very large ($25 billion in sales in 2007) and sophisticated company, if it profitably could have sold Indocin at a monopoly price, it arguably would have done so. However, there is evidence that Merck had a large product portfolio that included other pharmaceutical products that were more profitable than Indocin. It is arguable that if it sold at a monopoly price a product used to treat premature babies, that could damage its reputation and its sales of those more profitable products. A fortiori, it arguably would not have the incentive to acquire another treatment, that would tend to

confirm these conclusions.

There is reason to believe that the sale of Indocin to Ovation had the effect of eliminating the reputational constraints that Merck faced prior to the sale. There is evidence that Ovation lacked Merck's large product portfolio and thus was not concerned, as Merck had been, that the sale of Indocin at a monopoly price could damage its reputation and sales of a more profitable product. More specifically, there is evidence that after the transaction, Ovation began charging roughly 1300 percent more than the price at which Merck sold the product. Put differently, there is reason to believe that Merck's sale of Indocin to Ovation had the effect of enabling Ovation to exercise monopoly power in its pricing of Indocin, which Merck could not profitably do prior to the transaction. More

Such a change would not be without precedent. It could be seen as a variant of a number of Supreme Court and lower federal court cases that have held that a transaction that may result in a substantial lessening of competition or tend to create a monopoly in concerns neither horizontal nor vertical in nature would violate Section 7. See, e.g., FTC v. Procter & Gamble, 386 U.S. 568, 577 (1967) ("All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."); Ekco Products Co. v. FTC, 347 F.2d 745 (7th Cir. 1965) (acquisition of firm with a monopoly by a firm that did not compete in the monopolized market held to violate Section 7 when the acquiring firm protected the monopoly power it acquired by purchasing a new entrant that the acquired firm would not have purchased). As the leading antitrust treatise acknowledges, this precedent . . . has not been overruled. PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, (2nd and 3rd Ed. 1998-2007 and supplement 8/08) ¶ 1140.[1]

Indeed, a similar theory appears in the agencies' 1992 Horizontal Merger Guidelines, which assert that the acquisition of a maverick firm which, prior to the acquisition, constrained the pricing in a market, would violate Section 7 because the transaction would eliminate the pre-transaction constraints. See Section 2.12 and note 20. The source of the pre-transaction constraints on profit maximization (the source in the maverick case being the maverick's pricing) and the

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[1] The treatise observes that this case does not reflect current economic thinking, but it states that it would be arrogant to believe that today's economics is so clearly true that it will never give way to alternative views finding greater basis for concern. Id. The treatise describes, as the most serious flaw in this jurisprudence, the tendency to permit almost unrestrained speculation about future possibilities by judges. Id. at ¶ 1120a. That of course is manifestly not true of this case, where the merger is consummated: there is no need to speculate about its effects.

be very similar to Exxo Products,